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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-853

(~~MISCELLANEOUS DOCKET~~)

BLAND CALVIN GATEWOOD,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

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v.

STATE OF MARYLAND,

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PETITION FOR WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

Petitioner, Bland Calvin Gatewood, prays that a writ of certiorari issue to review the judgment of the Maryland Court of Appeals, in effect, affirming the judgment of conviction reviewed by the Court of Special Appeals of Maryland by denying certiorari, and entered by the Criminal Court of Baltimore City, Maryland.

OPINION BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 15 Md. App. 450, 291 A.2d 688 and is appended. No opinion was filed by the Maryland Court of Appeals.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on September 12, 1972, which denied review of the decision of the Court of Special Appeals of Maryland. This petition is filed within ninety (90) days of the date of the judgment as required by rule 22(1) of the rules of this court.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

QUESTION PRESENTED

The question presented in this petition is whether or not petitioner was denied due process and equal protection of the law as a result of the error of the trial court in convicting the petitioner without sufficient evidence as is required by Maryland and the United States Constitutions.

STATEMENT OF FACTS

On October 6, 1970 petitioner was indicted in the Criminal Court of Baltimore City, Maryland in Indictment No. 5061, a four count indictment charging that he did on September 16, 1790;

1. Unlawfully sell a lottery ticket to an unknown person.

2. Unlawfully keep a room for the purpose of selling lottery tickets.

3. Unlawfully and knowingly permit a room at 4115 Groveland Avenue, of which he was the owner, to be used as a place to sell lottery tickets.

4. Unlawfully have in his possession lottery paraphernalia.

At the trial on September 21, 1971, appellant agreed to stipulate as to what the state's witness would testify if

they were called. This testimony was substantially as follows:

That on two previous days they had observed the premises at 4115 Groveland Avenue and overheard conversation which lead them to believe that a lottery was taking place.

That on the 15th of September they observed Petitioner driving a 1969 Chevrolet, park in front of the premises, leave the automobile and enter the house while discussing lottery in a loud voice and entered the premises on the 3rd floor from a rear stairway.

That a check of Department of Motor Vehicles indicated that the 1969 Chevrolet was not owned by Petitioner, but by one Bernice Glenn, not a party to these proceedings, nor otherwise identified except by address.

Armed with a search and seizure warrant the police raided the premises at 4115 Groveland Avenue on the 3rd floor and surprised a 6′ 2″, 22 year old male in a room with lottery paraphernalia and a set of car keys on the table beside him. One of the raiding policemen had immediately prior to the break in, advised his fellow officers that he had seen Petitioner enter the premises. However, a search of the premises showed that Petitioner was not present.

Taking the keys found on the table beside the 22 year old male, one Artie McKeever, the police searched the 1969 Chevrolet which was parked near the premises. There was no testimony that any of the raiding policemen had seen Petitioner drive the 1969 Chevrolet on the date of the raid, the 16th of September, 1971. However, the police claimed to have found lottery in the automobile and also to have found eye glasses bearing the name of the Petitioner.

Petitioner was later arrested on a warrant charging him with the violation of lottery laws on the 16th of September 1971. He was subsequently tried and convicted, which is the reason for this petition.

The Court returned a verdict of guilty of possession of lottery, the fourth count of indictment 5061, and sentenced Petitioner to 4 years imprisonment with the Department of Correctional Services.

Petitioner appealed to the Maryland Court of Special Appeals and in case No. 682, September Term, 1971, that Court affirmed his conviction. Petitioner then petitioned the Maryland Court of Appeals to grant him writ of certiorari which was denied in Misc. Case No. 162, September Term, 1972.

A copy of the opinion of the Court of Special Appeals is attached hereto and made a part hereof as appendix "A". The mandate of the above Court was set for the 5th day of July, 1972, and was executed on that date. A timely petition for a writ of certiorari was then taken to the court of last resort in the State of Maryland, the Court of Appeals of Maryland, which petition for writ of certiorari was denied as aforesaid on the 12th of September 1972.

REASONS FOR GRANTING THE WRIT

In this case the Maryland Courts have gone contrary to their own decisions in order to achieve conviction of the Petitioner. There can be no doubt that Petitioner's constitutional rights to due process and equal protection were violated by his having been convicted without evidence in this case.

Petitioner was convicted of possession of lottery paraphernalia, apparently as a result of a search having been made of an automobile in which lottery was alleged to

have been found. Petitioner had been seen driving this particular automobile on a day prior to the search. On the day of the search, the Petitioner was not present at the time of the search, but the police claimed to have found eye glasses bearing Petitioner's name and some personal papers or possessions in the glove compartment of the automobile. There was no evidence that Petitioner was in physical or constructive possession of anything that might have been found in the car at the time of the search. The car was not owned by Petitioner. The indication is that the car was being driven on the particular day of the search by the person from whom the police took the keys. It will be noticed that the keys were found on the kitchen table, together with lottery, in the possession of a person other than Petitioner.

Certainly the presence of a pair of glasses and, perhaps other personal effects of Petitioner in the glove compartment of a car belonging to another person could just as well be construed to have been placed there prior to the placing of any lottery material. There was no way the police nor anyone else could tell whether Petitioner's personal papers and glasses were placed in the glove compartment prior or subsequent to the placing of any lottery material. It could also be assumed that the lottery material might have been in the glove compartment prior to Petitioner's use of the car on the day preceding the raid. Since the car obviously belonged to another, it is difficult to see how Petitioner could be convicted on a basis of what may have been in the glove compartment of an automobile belonging to another. Perhaps a different case would have arisen had the automobile been searched on the day and near the time at which Petitioner had been seen driving it. However, the important thing here seems to be that the automobile was searched on quite another

day, and there is no evidence of any type that Petitioner was using the car on this particular day.

The Maryland courts, have, in other cases, decided that "mere presence" at or near the scene of a crime is insufficient to support a conviction. *Watson v. State*, 208 Md. 210; *Neal v. State*, 2 Md. App. 659, 236 A.2d 754 (1968).

The instant case is apparently one of "mere absence". The Maryland courts have said:

> "No matter how sordid and how suspicious the circumstances, we cannot permit a person charged with crime to be convicted without evidence. The conjectures of the trial judge might be entirely correct. . . . Nevertheless, conviction without proof cannot be sustained under the laws of this state. A man is innocent, until he is proven guilty, and there must be evidence which leads to such a result". *Robinson, et al. v. State*, 5 Md. App. 723, 249 A.2d 504 (1969).

Nowhere in this case was there sufficient evidence upon which one could or should be convicted. At the trial of the cause counsel for Petitioner relied chiefly on the case of *Williams v. State*, 7 Md. App. 5, and the cases cited therein. The *Williams* case was reversed because of the insufficiency of the evidence in a lottery operation, and was a much stronger case than the instant one. The *Williams* brothers were licensees of a tavern in which lottery was found. There was no evidence that either brother had participated directly in the lottery operations or that they were in actual physical possession at the time of the search. The Court held that the evidence was insufficient to show or support a rational inference that they had constructive possession of the slips or that they had obtained a measure of control or dominion over them. One of the brothers lived on the second floor of the

premises. The Court went on to say in the *Williams* case; *supra*, at p. 12 "We do not think that mere occupancy of or presence in a house or office satisfies the requirement of ownership."

The Maryland Court of Appeals in the *Williams* case, *supra*, cited Webster's Third New International Dictionary, unabridged, which defines possession as "the act of or condition of having in or taking into one's control or holding at one's disposal". The Court went on to say, "This definition is in accord with the rules enunciated by the cases in this State. When the proscribed articles are found on the person of the traverser, possession by him is clear. He may also possess them by having them in his immediate control". In the instant case there is no proof of any immediate control.

In the case of *Scarborough v. State*, 3 Md. App. 208, a conviction was reversed for permitting a room of which he was the owner to be used for illegal purposes. The conviction in that case was reversed because there was no proof as to ownership of the restaurant.

In the case of *Propst, May & May v. State*, 5 Md. App. 44, it was decided that mere residence in the raided premises was insufficient to support the conviction of one of the Petitioner. There was no evidence that he had ever been at the premises when illegal activities were being conducted. In the case of *Gerstein v. State*, 10 Md. App. 322, 335 it was held my the Court that presence in the basement, being identified as a participant, and attempting to destroy evidence was sufficient to support a conviction.

In the case of *Berry v. State*, 95 A.2d 319 (1953), the accused had made frequent appearances at apartments where lottery paraphernalia was found at times when

tenants were at work, and this, coupled with his possession of a key affording him access to both apartments permitted an inference that he was in possession and that the gambling activities were his. In the instant case there was no proof of possession of a key nor any indica of ownership or control. Note also that in the *Berry* case, the visits were frequent, but here there was only testimony of one visit on the preceding day. See also *Shelton v. State*, 95 A.2d 319 where the accused owned the bar, was a frequent visitor, lottery was carried on openly and notoriously, and lottery slips were found in his cash register, written on same type of paper as some blank pads also found in cash register.

In the instant case, there was no indica of guilt such as was evidenced in the cases where the evidence has been held sufficient. In the cases enumerated above where the evidence was held sufficient, the State had stronger cases than the one at bar. Here, Petitioner was alleged to have been seen going into a building on a day prior to a raid. There is no evidence that the building was used for lottery on the day prior to the raid, except that there is only suspicion that it may have been so used. On the day of the raid, the police made such a sudden entry that they surprised a strapping, healthy six foot plus male in his very early twenties before he had an opportunity to escape or to dispose, or even attempt to dispose of the lottery paraphernalia. Petitioner, a man over fifty years of age, was nowhere to be found. The police offered several suggestions as to why he was not to be found, and the State overlooked the obvious explanation as to why Petitioner was not found on the raided premises. Certainly he could not be found if he were not there. Nor was there any constructive possession. There was no evidence to indicate that Petitioner lived or resided, leased, owned, or had any

connection whatever with the address on Groveland Avenue except that the police say that they saw him go into the house on a previous day. It is a chilling thought to contemplate that one may be convicted because the police claim they saw him enter on a previous day a house where some illegal activity now occurs. This is worse than "guilt by association". Nor was Petitioner found with any evidence of lottery, nor was he found attempting to destroy any evidence of lottery, nor was he even present when the lottery was proved to have occurred. Here Petitioner was convicted on suspicion only.

Here there was only suspicion, not even circumstantial evidence. Even in cases of circumstantial evidence the Court of Appeals has held that, "When guilt is based solely upon circumstantial evidence, the circumstances taken together, must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of innocence". *Vincent v. State*, 220 Md. 232.

Even as to the automobile, the only testimony that the police could give as to it is that they had seen Petitioner using the automobile on a previous day. There is testimony to indicate that some of his personal effects were found in the car. Could they have been forgotten from the day of previous use? And would this alone make Petitioner culpable for lottery material or any other contraband that someone else may have subsequently placed in the car? That Petitioner had borrowed the car seems clear from the fact that it was registered to another. That it had more than one user seems obvious from the fact that McKeever was apparently using it on the day of the raid. True, the State may suspect that there was lottery in the car on the day that they had seen Petitioner using it, but there is no proof of this.

Even if it could be assumed that there may have been lottery in the automobile or in the house on the day that Petitioner was seen driving the described automobile, yet it was not proven. There was only suspicion. No corpus delecti was established.

In this case Petitioner was sentenced to serve four years imprisonment solely on suspicion, and without a shread of evidence to validly support his conviction.

CONCLUSION

For the reasons stated above Petitioner respectfully submits that his petition for writ of certiorari to the Maryland Court of Appeals should be granted.

Respectfully submitted,

LEONARD A. BRISCOE,
Attorney for Petitioner.

APPENDIX

(Reported)

September Term, 1971

No. 682

Bland Calvin Gatewood
v.
State of Maryland

Murphy, C.J., Powers, Carter, JJ.

Opinion by Powers, J.

Filed June 5, 1972

Appellant was indicted on October 6, 1970 by the grand jury for the City of Baltimore in four counts, charging that he did on September 16, 1970:

1. Unlawfully sell a lottery ticket to an unknown person.
2. Unlawfully keep a room at 4115 Groveland Avenue for the purpose of selling lottery tickets.
3. Unlawfully and knowingly permit a room at 4115 Groveland Avenue, of which he was the owner, to be used as a place for selling lottery tickets.
4. Unlawfully have in his possession certain lottery paraphernalia.

To the indictment was attached an addendum warning appellant that he had formerly been convicted of a viola-

tion of the lottery laws, that the State intended to prosecute him as a subsequent offender, and of the maximum punishment if he should be convicted of the current offense and found to be a subsequent offender. See Code, Art. 27, § 366, *Gatewood v. State*, 244 Md. 609, 224 A.2d 677; *Ware v. State*, 13 Md. App. 302, 283 A.2d 177, Maryland Rule 713.

Upon arraignment before Judge Basil Thomas in the Criminal Court of Baltimore on September 21, 1971, appellant pleaded not guilty, waived a jury trial and asked to be tried by the court. Appellant stipulated as to the State's case, reserving the right to take the stand and to call witnesses. He elected to reserve the issue of whether he was a subsequent offender until the determination of the main case.

The Assistant State's Attorney outlined to the court what the testimony of the State's witnesses would be if they were called. Appellant moved for a judgment of acquittal. The motion was denied. No further evidence was offered. The court announced that the case would be held *sub curia*.

Three days later when the case was called for further proceedings, Judge Thomas entered a finding of guilty under the fourth count of the indictment. Appellant filed a motion for a new trial and asked to be heard at that time. The motion was heard and denied. The State then called up the addendum, to which appellant pleaded "not guilty". A statement of facts concerning the prior conviction was given to the court by stipulation, and the court determined that appellant was a subsequent offender.

Judge Thomas then afforded the opportunity to make a statement and to present information in mitigation of punishment. Maryland Rule 761 a. In the course of his statement, appellant's counsel said:

> "Now, in my discussions with the State's Attorney on this case — first of all, there hasn't been any plea bargaining as such, but we did go on an agreed statement of facts, and it was my understanding that they

would not press for a jail term in this case. I understand this is [not] binding on the Court, but in our discussions, however, I want the Court to know about this."

The Assistant State's Attorney present on that occasion was not the same Assistant who had been present at the trial itself. The following then occurred:

"(Mr. Simonson) Your Honor, Mr. Briscoe said that he was under the impression that the State was not going to press for a jail sentence. To be perfectly candid with the Court, I know nothing about this. I prefer to withhold any recommendation until I have an opportunity to consider with my colleague who handled this case—

(The Court) Well, it was a not-guilty plea anyway, and it would seem to me that wouldn't be binding on the Court. There wasn't a guilty plea in this case where the defendant was induced to plead guilty because there were some promises made to him.

(Mr. Briscoe) This isn't what we are claiming.

(The Court) What are you claiming, Mr. Briscoe?

(Mr. Briscoe) I am claiming previously what I said—

(The Court) What is that?

(Mr. Briscoe) —that we had agreed to go on a statement of facts in this case, and the State — I had discussed this with Mr. Fisher, the State's Attorney who tried the case. I wouldn't stand here and tell the Court I did if I didn't. And it was my impression that if we went on the statement of facts and got the case over with, that they would not press for a jail sentence, and I am simply giving the Court that information for what it is worth.

(The Court) That does not mean — in other words, they wouldn't make any statement at all with respect to a jail sentence?

(Mr. Briscoe) Right — this is true.

(Mr. Simonson) As I say, I know nothing about that, but I will stand mute, anyway."

The court requested information concerning appellant's background. After a recess this was supplied by Mr. Simonson, including the following:

"Your Honor, also in 1970, or early '71, I'm not sure of the exact date, the defendant was found guilty of perjury. That case is on appeal, however.

(Mr. Briscoe) Yes, sir, it is on appeal.

(Mr. Simonson) In front of Judge Prendergast — found guilty of perjury in front of Judge Prendergast.

(Mr. Briscoe) First of all, that case is on appeal, your Honor. I understand there is a very good possibility — it is being argued before the Special Court of Appeals.

(The Court) It is on appeal? If it is a good possibility or bad, we will find out."[1]

After a further statement by appellant's counsel in mitigation, Judge Thomas imposed a sentence of four years under the jurisdiction of the Department of Correctional Services and a fine of five thousand dollars and costs. On the same day an appeal was entered.

While this appeal was pending, appellant filed in the lower court on October 20, 1971, a paper which he titled, "Motion In Arrest Of Judgment And For Appropriate Relief Or For Reconsideration Of Sentence". This motion came to the attention of Judge Thomas on November 11, 1971. The State moved to dismiss on the grounds that the

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[1] See *Gatewood v. State*, 13 Md. App. 317, 283 A.2d 193, in which we affirmed the perjury conviction, and our subsequent opinion in the same case upon reconsideration after remand by the Court of Appeals without affirmance or reversal, *Gatewood v. State*, 15 Md. App. ....., ... A. 2d ....., No. 44, September Term, 1971, filed May 16, 1972, in which we reversed the perjury conviction.

Rules do not provide for any such motion and that because an appeal was pending the court had no further jurisdiction in the case.

After allowing appellant's counsel wide latitude in arguing for relief from the conviction and sentence, Judge Thomas said:

> "Let me say that I think that your motion for arrest of judgment and appropriate relief and for reconsideration of sentence, all being filed after the appeal has been taken, is not seasonably filed."

The court further said:

> "I am totally unimpressed with this motion, and I say that I don't think it is a proper one to file at this time when an appeal is pending, but even if it is proper, I find no basis for it, and would certainly deny the motion."

We agree that the motion was not properly before the lower court, and the proceedings on it will not be considered in this appeal.

Appellant asks us to consider:

1. Whether he was denied due process and equal protection of the laws by having the court advised prior to trial that he was to be tried also on an addendum, thereby prejudicing his right to a fair trial.

2. Whether he was denied due process and equal protection of the laws by foregoing valuable rights in contemplation of a recommendation of a fine only, where Assistant State's Attorneys then failed to make such recommendation and denied that there had been negotiations.

3. Whether the evidence in this case was sufficient to support the conviction.

4. Whether he was denied fundamental due process and equal protection of the laws when the court was informed at his sentence hearing that appellant had been convicted of perjury.

1.

The contention that appellant's right to a fair trial was prejudiced because the judge was made aware, before trial, that there was a subsequent offender addendum attached to the indictment, is entirely without merit. Maryland Rule 713 permits the defendant, upon arraignment, to elect to have the subsequent offender issue determined after conviction. In the absence of such an election the issue is to be determined concurrently with the issue of guilt of the current offense.

We cannot see how the pendency of two accusations, neither yet proved, could prejudice the mind of a trial judge when the pendency of one accusation would not. *State v. Hutchinson*, 260 Md. 227, 271 A.2d 641. Nor can we see how a defendant could make the required election without the knowledge of the court. Appellant's right to a fair trial was not prejudiced.

2.

Appellant's second contention must be based upon a misreading of the transcript, and is groundless. What we have quoted above shows that when appellant's counsel asserted an "understanding" with a different Assistant State's Attorney, the Assistant then present, far from denying that there had been "negotiations", merely said that he knew nothing about them, and wanted to confer with his colleague, but thereafter said, "I will stand mute, anyway." He did so. He made no recommendation. Appellant now attempts to pervert what he described below as an "understanding that they would not press for a jail term" into an understanding that the State would recommend a fine only. He made no such assertion below, and the record shows his present position to be erroneous.

Even if we assume that the "understanding" asserted below was in fact reached, and that fairness requires that a promise made under such circumstances must be fulfilled (Cf. *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, ... S. Ct.), the record shows that the State did in fact fulfill it.

3.

In *Williams v. State*, 7 Md. App. 5, 252 A.2d 880, we discussed the applicable law and the evidence upon which appellants in that case were convicted in the trial court of possession of lottery slips. After noting the dictionary definition of "possession" as "the act or condition of having in or taking into one's control or holding at one's disposal", we said, at page 17:

> "Considering the evidence before the court, including the places where the lottery slips were found, we do not believe that it showed directly or supported a rational inference that the appellants had constructive possession of the lottery slips or that they had obtained a measure of control or dominion over the custody of the slips. Thus the lower court could not be fairly convinced beyond a reasonable doubt of the appellants' guilt of the offense charged in the 4th count."

The undisputed facts before the lower court in the present case lead us to conclude that the evidence was legally sufficient to show directly or support a rational inference that the lottery paraphernalia was, at least constructively, in appellant's possession.

As Chief Judge Murphy said for this Court in *Coleman v. State*, 4 Md. App. 386, 243 A.2d 24, at page 391:

> "Since the instant case was tried by the court sitting without a jury, we may review the case upon both the law and the evidence, but cannot set aside the judgment of the lower court on the evidence unless clearly erroneous, giving due regard to the opportunity of the lower court to judge the credibility of the witnesses. Maryland Rule 1086. We do not, therefore, determine whether the defendant was guilty beyond a reasonable doubt; our function is to determine whether there was any evidence, or proper inferences from the evidence, upon which the trial court could find the defendant guilty beyond a reasonable doubt, and if the

record shows such evidence, or proper inferences, we cannot find that the decision was clearly erroneous."

The evidence, which was uncontroverted, showed that on September 15, 1970 a police officer parked so as to observe the premises at 4115 Groveland Avenue. He saw appellant drive up in a 1969 Chevrolet sedan with a woman passenger, and park nearby. Both walked past the officer as they approached the rear of the premises, went up the rear stairs to the third floor, and entered. They had not emerged when the officer left 30 minutes later. As they walked past the officer he overheard them talking — "the conversation was related to lottery and referred to straightening out numbers when we get upstairs".

A search warrant was obtained for the premises and for the described automobile. It was executed on September 16, 1970. Its validity is not questioned.

As several officers arrived at the premises to execute the warrant, the same automobile was observed, parked in front of the premises. One of the officers saw appellant go up the "fire escape" at the rear of the premises and enter the premises at the third floor. The officers entered the third floor rear, after breaking down the door. There they found another man, and numerous lottery tickets and other paraphernalia. They did not find appellant, but did find interior stairways leading to other apartments in the building.

The described vehicle was then searched. In the glove compartment were numerous lottery slips and other records relating to lottery, a pair of sunglasses with the name Bland Gatewood stamped on the frame, and personal papers in the name of Bland Gatewood. The automobile was registered to one Bernice Virginia Glenn, not otherwise identified.

We cannot say that the trial judge was clearly in error when he deemed it rational to infer, based upon this evidence, that appellant constructively possessed this lottery paraphernalia by having it in his control or at his disposal.

At the time Judge Thomas imposed the sentence in this case, he said:

> "The defendant has a record and a history of involvement in violation of the lottery laws. Apparently, he hasn't learned his lesson, and he was — I note that in 1942, he was convicted of lottery, in '57 for carrying a deadly weapon, in '67 he was given a four-year suspended term for bookmaking, which seems to be a fairly serious charge in this case — and in '69 he was given six months and a fine. Apparently he has not learned his lesson.
>
> From all the facts in this case, it would seem that he was involved, at least, in a substantial and large lottery operation.
>
> From all the facts of this case, from the history of this defendant, the Court feels that a substantial period of incarceration is called for.
>
> The sentence of this Court, therefore, is four years under the jurisdiction of the Department of Correctional Services accounting from this date — he has been on bail?
>
> (Mr. Briscoe) Yes, your Honor.
>
> (The Court) Counting from this date — and a fine of five thousand dollars and costs."

When the perjury conviction was mentioned by the Assistant State's Attorney at the sentencing, he pointed out that the case was on appeal. Appellant made no objection, and sought only to make sure that the judge was aware of the pending appeal.

We said in *Bryson v. State*, 7 Md. App. 353, 255 A.2d 469, at page 355:

> "This imposition of a sentence in a criminal trial is a matter that is peculiarly within the province of the trial judge, *Gee v. State*, 2 Md. App. 61, 233 A.2d 336. The trial judge is not limited by strict rules of evidence in his presentence investigation, which in-

cludes examination of the person's reputation, past offenses, habits, health, and the like, *Baker v. State*, *supra* [3 Md. App. 251, 238 A.2d 561] at 257."

Again, we said in *Mahoney v. State*, 13 Md. App. 105, 281 A.2d 421, at page 112:

"We have held that the matter of sentencing within the limits of the law is peculiar to the trial judge and will not be reviewed by this Court unless dictated by passion, prejudice, ill-will, or other unworthy motive."

The Supreme Court of the United States, in *United States v. Tucker*, ... U.S. ....., 30 L. Ed. 2d 592, 92 S. Ct. ....., after referring in similar terms to the wide discretion reposed in a trial judge in determining sentence, said:

"But these general propositions do not decide the case before us. For we deal here not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. As in Townsend v. Burke, 334 U.S. 736, 92 L. Ed. 1690, 68 S. Ct. 1252, 'this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue.' Id., at 741, 92 L. Ed. at 1693. The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him. Yet it is now clear that two of those convictions were wholly unconstitutional under Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 A.L.R.2d 733.

We need not speculate about whether the outcome of the respondent's 1938 and 1946 prosecutions would necessarily have been different if he had had the help of a lawyer. Such speculation is not only fruitless, but quite beside the point. For the real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had had counsel, but whether the sentence in the 1953 federal case might have been different if the sen-

tencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained.

We agree with the Court of Appeals that the answer to this question must be 'yes.' For if the trial judge in 1953 had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding."

Here we are not confronted with the use of a prior conviction without counsel against a person to enhance punishment, forbidden by *Burgett v. Texas*, 389 U.S. 109, 19 L. Ed. 2d 319, 88 S. Ct. 258, as eroding the principle of *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792. Nor was there here a violation of Code, Art. 35, § 10, which deals with the admissibility of evidence.

It is apparent from the remarks of Judge Thomas, quoted above, that the reference to the perjury conviction pending on appeal was not considered by him, and had no effect in enhancing punishment.

Judgment affirmed. Appellant to pay costs.

ORDER

(Filed September 12, 1972)

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied. Chief Judge Robert C. Murphy did not take part in this matter.

/s/ WILSON K. BARNES,

Senior Judge.

ORDER

(Filed October 17, 1972)

Upon consideration of the Motion for Reconsideration filed on October 12, 1972, in the above entitled matter, it is

ORDERED by the Court of Appeals of Maryland that the said motion be, and it is hereby, denied. Chief Judge Robert C. Murphy did not take part in this matter.

s/ WILLIAM J. MCWILLIAMS,

Judge.